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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
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April 24, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey:

Since 2012, this Committee has conducted oversight related to deficiencies in the FBI's hair forensics lab and the FBI's review of potentially affected cases. A 1997 report by the Department of Justice Office of Inspector General (OIG) confirmed whistleblower claims that FBI hair examiners were using scientifically unsupportable analysis and overstated testimony in criminal prosecutions.¹ We write today because the Committee recently received new information showing that the FBI understood the scientific limits of hair microscopy long before 1997, and identified at least one instance in which a hair examiner's testimony exceeded those limits.

The Committee recently became aware of internal FBI memoranda (memos) showing that, in 1991, the FBI identified problematic testimony that fits the description of testimony that the FBI classified in 2012 as Error Type 3.² Specifically, the FBI identified testimony provided in 1989 by Supervisory Special Agent (SSA) Michael Malone as problematic because SSA Malone cited his success rate in distinguishing between test hair samples to support the credibility of his conclusion that the hair samples in question were differentiable.³ The memos indicate that the FBI took corrective action by counseling SSA Malone and the entire unit of hair

¹ U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AN ASSESSMENT OF THE 1996 DEP'T OF JUSTICE TASK FORCE REVIEW OF THE FBI LAB. 38 (2014) [hereinafter OIG REPORT].

² Memorandum from K.W. Nimmich to Mr. Hicks 1-3 (Nov. 15, 1991) (on file with Comm.). Error Type 3 is defined as the following: The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. FBI, MICROSCOPIC HAIR COMPARISON Analysis 1 (Nov. 9, 2012).

³ Malone testified that out of the 10,000 known hair samples he had examined, he was unable to distinguish known samples on two occasions; Memorandum from K.W. Nimmich to Mr. Hicks 2 (Nov. 15, 1991); Memorandum from K.W. Nimmich to Mr. Hicks (Dec. 6, 1991).

and fiber examiners against providing this type of testimony.⁴ The first memo provides that “SSA Malone has been instructed by Unit Chief [redacted] not to quote his experience in such a way that it could be interpreted as a statistic during testimony or during discussions with contributors and prosecutors.”⁵ It is unclear whether the Inspector General’s office was provided these memos during its extensive review, in which Malone was a central figure.

These memos raise concern because they demonstrate that, in 1991, the FBI recognized instances where testimony exceeded the scope of science, which contradicts the FBI’s claims that it only later developed such an understanding. Moreover, the FBI’s corrective actions were apparently ineffective because examiners continued to provide erroneous testimony, including the exact type of testimony cautioned against in the 1991 memos. SSA Malone, in particular, was allowed to continue to provide erroneous testimony for another eight years until he retired in 1999. During its review of the hair forensics program, the Department’s Criminal Division Task Force identified SSA Malone’s testimony as “consistently problematic,” and the OIG reported that his “faulty analysis and scientifically unsupportable testimony” contributed to at least six convictions that were eventually reversed.⁶

Despite requests for documents and FOIA requests, the FBI failed to provide the memos to this Committee, the National Association of Criminal Defense Lawyers (NACDL), the Innocence Project, or to whistleblowers. Yet, notations on the memos indicate that they were placed in SSA Malone’s personnel file. The FBI counsel’s office claims it was unaware of the memos’ existence or the underlying facts described in the memos until the NACDL recently brought the memos to their attention. If true, it is difficult to understand how the FBI’s review of the hair forensics program failed to uncover an easily discoverable document containing key information about the FBI’s early knowledge of problematic testimony and its failed attempt to correct the problem.

The Committee deserves an explanation of the recent surfacing of the 1991 memos and the circumstances described in these memos. Accordingly, please provide the following and schedule a briefing with Committee staff by no later than May 9, 2017:

1. Please explain how the FBI failed to locate and disclose the 1991 memos in a more timely manner.
 - a. Prior to the NACDL and the Innocence Project presenting the 1991 memos to the FBI counsel’s office, was the FBI aware of the memos’ existence or of the underlying events described in the memos?
 - b. Does SSA Malone’s personnel file contain the 1991 memos?
 - c. Were they produced to the OIG during its review? If not, why not?

⁴ Memorandum from K.W. Nimmich to Mr. Hicks 2–3 (Nov. 15, 1991); Memorandum from K.W. Nimmich to Mr. Hicks (Dec. 6, 1991).

⁵ Memorandum from K.W. Nimmich to Mr. Hicks 2 (Nov. 15, 1991).

⁶ OIG REPORT at ii.

- d. Please explain how the FBI failed to uncover and produce these memos during its review of the hair forensics program and during document searches in response to document requests and FOIA requests.
 - e. Please describe the steps the FBI has taken to determine whether there are any additional documents or materials missing from the FBI's records that are relevant to the review of the hair forensics program.
 - f. Has the FBI taken steps to disclose these memos to parties or victims in past and present cases where the memos should have been produced?
2. Beyond the details contained in the 1991 memos, does the FBI have additional records of the events described in the memos? If so, please produce them to the Committee.
 3. How did the FBI's counseling to SSA Malone and the other hair and fiber examiners go unheeded?
 4. Does the FBI have records of other instances in which a hair examiner's testimony, including SSA Malone's testimony, was identified as problematic? If so, please produce them to the Committee.

Thank you in advance for your cooperation with this request. If you have questions, contact Samantha Brennan of my Judiciary Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary



Patrick J. Leahy
U.S. Senator

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary